IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

CIVIL APPEAL CASE 08 of 2012

BETWEEN: **AIRPORTS VANUATU LIMITED**
Appellant

AND: **RANGKON BERANGBEN**
Respondent

Coram: *Vincent LunabeK CJ*

Counsels: *Mr Edward Nalyal for Appellant*
Ms Pauline Kalwatman for Respondent

JUDGMENT

Introduction

1. This is a notice of appeal against a judgment of the Magistrate's Court dated 30 April 2012.

2. The Appellant, Airports Vanuatu Limited, was the employer of the Respondent. The Respondent was employed by the Appellant for a period of 2 years from July 2008 to 9 July 2010. He was first employed on probation for a period of 6 months. His responsibilities during his probation period include:

-Security Officer
-Screening luggage during departure on international flights,
-Controlling, guiding and escorting cargoes into plane;
-Sweeping ran-ways and Apron and securing all other areas;

3. The Respondent was then appointed on permanent basis on January 2009. He was then moved to administration at the Airports Vanuatu Limited as Airports identification card officer. He worked for 1 year and 7 months before he was terminated by the Appellant on 9 July 2010.

Background events leading up to termination

4. On 21 June 2010, the Respondent raised some employment issues through an e-mail he sent to the General Manager of the Appellant (Mr Peter Bong). He was raising issues of

overtime pay. He said he was doing work for other people for only small salary. He asked his superior (Mr Bong) to tell him whether he performed his work on the standard as required by him (Mr Bong). He asked his superior (Mr Bong) to put that into writing and that he will be out of work on 21 June 2010 until the time Mr Bong will notify him of his decision.

5. On 22 June 2010, the Respondent was back in office to check his e-mail. When he went inside his office, security officer (Sefo Kalotiti) escorted him out of office.

6. On 25 June 2010, the Appellant wrote a letter to Mr Rangkon transferring him from his position inside office administration into Shift Bravo effective from the date of 27 June 2010.

7. On 26 June 2010, Mr Rangkon Berangben wrote a letter to Mr Bong informing him that he is not going to take the new position of Shift Bravo until his superior (Bong) answered his e-mail of 21 June 2010. He never applied to be transferred from his current position to his previous position or to a new position.

8. On 9 July 2010, the Appellant wrote a letter to the Respondent dismissing him from his employment with effect from 12 July 2010.

Magistrate Court claim and decision

9. On 05 May 2011, the Respondent filed a claim in the Magistrate Court claiming for:

   (i) An order for a judgment in the sum of Eight Hundred and Eleven Thousand Two Hundred and Twenty Two Vatu (811,222) against the Appellant being for the following:

   (a) 500,000 Vatu for unlawful dismissal;

   (b) 200,000 Vatu for ill treatment;

   (c) 50,000 Vatu for the manner of dismissal;

   (d) 43,750 Vatu for severance for 1 year and 11 months;

   (e) 17,472 Vatu for dismissing the Respondent without notice; and

(f) An interests of 5% per month;

(g) Costs;

(h) Any other orders for Court deems fit.

10. On 30 April 2012, the Magistrates Court issued a judgment in favour of the Respondent granting the Respondent each of all the remedies he sought in the Magistrate's Court including costs and 5% interest per month.

11. It was this judgment of the Magistrate's Court dated 30 April 2012 which was the subject of this appeal before this Court.

Notice and grounds of Appeal and considerations

12. In his Notice of Appeal the Appellant seeks for the following orders:

(i) The judgment of the Magistrate's Court dated 30 April 2012 be set aside.

(ii) The matter be retried in the Magistrate's Court before a different Magistrate.

(iii) In the alternative, that judgment be given in favour of the Appellant, by dismissing the claim.

(iv) Costs of this Appeal will be paid by the Respondent; and in the event order 3 is granted then costs at first instance also will be paid by the Respondent.

13. The Appellant advanced his appeal on 7 grounds as detailed in his Notice of Appeal filed 26 July 2012.

14. The Appellant confirmed and maintained the following grounds of Appeal:-

(i) The Magistrate erred in fact and in law in failing to take into account the evidence of the Appellant that the Respondent left or deserted his work without the permission of the Appellant as his employer, after the Respondent sent the email of 21 June 2010.

(ii) The Magistrate erred in fact and law in failing to take into account the Appellant's evidence that:

(a) The Appellant asked the Respondent to move to another task at Shift Bravo; and such move was not a demotion, and he continued to receive the same salary.

(b) The Respondent refused to be at his pick-up point so he could be picked up by the Appellant's officers to attend work.

(c) The Respondent refused to return to work on 27 June 2012, nor at any time thereafter.

(iii) The Magistrate erred in law and in fact in failing to find that it was lawful for the Appellant to terminate the Respondent's employment on the basis of refusal and neglect to come to work; was in accord with the Appellant's staff manual as per its clause 2.3 and 6.2.

(iv) The Magistrate erred in fact and in law in awarding amounts (pages 8 and 9 of judgment) which are excessive and contrary to the provisions of the Employment Act.

15. The other grounds of the Appeal were abandoned by the Appellant through Counsel during the hearing of this appeal.

16. The remaining grounds of appeal are considered in below.

Grounds 1 and 2 are dealt with together

17. The Appellant alleged that the Magistrate erred in fact and in law in not taking into account the evidence that the Respondent Rangkon left his work without the permission of his employer. The Appellant submitted that the Respondent left work at his own decision. The Appellant asked the Respondent to come back to work and sent a truck to pick him up. The Respondent sent a letter on 29 June 2010 that he will not return to work until the Appellant answered to his e-mail. The Appellant said if the Magistrate took into account this evidence, the judgment should not be in favour of the Respondent because what the Respondent did amounted to a summary dismissal. The Respondent disobeyed to lawful orders to return to work. The Appellant has the power to dismiss the Respondent under clause 6.2 of the Employment terms and conditions.

18. The Respondent submitted that the Magistrate was right in her judgment of 30 April 2010. It is said the Respondent did not come to work on 21 June 2010 because that was his day off. It is said the Respondent sent his e-mail letter on 21 June 2010. He expected an answer from his superior (the General Manager of the Appellant) Mr Bong. The Respondent did not attend work after he sent his letter. He knew Mr Bong as one of his relatives and he was apprehensive of his reaction as a "hard man". The next day 22 June 2016, the Respondent attended his office to check his e-mails. He was then escorted out by one of the staff of the Appellant at the order of Mr Bong.

19. It is said the Appellant did not dissert his work. The Respondent was not welcomed at his own work place. The Respondent submitted he was not aware of the letter of 25 June 2010 transferring him from his work indoor administration to outdoor Shift Bravo. He was not aware that a vehicle was sent by the Appellant to pick him up. It is said the Respondent expects a professional response from the Appellant in respect to his letter of 21 June 2010. But instead of answering the specific queries of the Respondent, the Appellant on 25 June 2010, issued a letter transferring him to a different position albeit same salaries.

20. The Respondent said at no time he disserted his work. He made a letter stating he will not take that new position until the General Manager of the Appellant (Mr Bong) responded to his e-mail of 21 2010.

21. The Magistrate made the following findings on her assessment of the evidence before her: *"There was no evidence AVSEC and AVL made any attempt to properly respond to the questions raised. Instead on 9th July 2010, AVL's CEO Mr Jeowangeh wrote to Mr Berangben dismissing him from AVSEC on the grounds that his action for not following orders of the AVSEC GM on Mr Bong to return to work amounted to serious misconduct. AVL through Mr Bong appeared to have used a blanket target to cover the whole issue by resorting to transfer him instead of calling him to discuss his concerns or at least to answer his queries. This is evident whereby Mr Bong having an Officer writing him a letter of transfer and ordering him to move to the position of Shift Bravo within two days. In addition, AVL disregarded Mr Berangben's second letter for Mr Bong to respond properly to his specific queries. Moreover, whereas AVL disregarded the second request*

to consider his concerns, AVL concluded Mr Berangben's actions amounted to serious misconduct thereby dismissing him without giving him an opportunity to answer to allegations of misconduct laid against him. There was no evidence presented in Court to show that AVL provided Mr Berangben an opportunity to respond to the allegations of serious misconduct before dismissing him from work."

22. I agree with the learned Magistrate's assessment of facts and conclusion of law in respect to ground 1. The Respondent was a permanent employee within the employment structure of the Appellant. On the evidence AVL first appointed Mr Berangben on July 2008 on probation period for six months. This job includes screening luggage during the departure of an international flight, controlling, guiding, escorting cargo into the plane, sweeping ran-way and apron and securing the aster ail holding area. There was no issue raised about proper job description in this initial probation appointment.

23. After the six months period, Mr Berangben was appointed permanently to another position stationed inside the administration office. His job was to issue identify cards to all users of the Airports security areas. These users include staff members of the Immigration Department, Customs, Quarantine, Vanuatu Pests, Drug Store, Airports operators such Air Vanuatu, Pacific Aviation, Safety Organisation, Civil Aviation Authority, National Bank of Vanuatu, Airport Vanuatu Limited and Foreign Affairs Department.

24. The learned Magistrate considered the evidence of the Appellant and found in effect that the letter of the Respondent to his employer to clarify the terms and conditions of his employment caused the termination of his employment as instead of responding to his concerns, the Appellant transferred the Respondent to the position he was during the probation period and ultimately terminated him. The first ground of Appeal is dismissed.

25. As to ground 2 of the appeal, the Appellant repeat his submissions made earlier in ground 1. It was said the Respondent salary remained the same from probation period until his permanent appointment. He was paid the same level of salary from indoor position to the position outdoor at Shift Bravo.

26. The Respondent submitted that the Magistrate was right in her judgment that on 25 June 2010, the Appellant issued a letter demoting the Respondent to the positon of Shift Bravo. It is said the transfer letter of 25 June 2010 has a demoting effect for the Respondent. It is further submitted that the transfer letter of the Appellant referred back to the Respondent's e-mail of 21 June 2010 outlining what the Respondent wanted and sought clarifications for. But the Appellant did not answer to the Respondent's queries instead made the letter of 25 June 2010.

27. On 29 June 2010, the Respondent wrote a letter to the Appellant stating that the Appellant failed to answer and clarify his concerns. He never asked for a transfer and he said he was still entitled to have answers to the questions he raised to the issues of his employment. The letter of 29 June 2010 was the Respondent's second letter seeking for clarifications from the Appellant on the terms and conditions of his employment. There was no clarification but a transfer letter and ultimately a termination letter dated 9 July 2010.

28. The facts assessed by the learned Magistrate amounted to demotion. Although, the salary is the same in the position he was transferred to, the Magistrate found, the salary was not a critical matter. He was transferred to the position he occupied for 6 months during the probation period. The Magistrate was satisfied on the evidence before her that the Respondent *"was ill treated by AVL first by concealing his job description which could have made it clear to him as to what his job was the correct salary for the position. Had these issues been made clear to him in the beginning, Mr Berangben may have not encountered difficulty in completing his assigned tasks and not be bounded by instructions to undertake other responsibilities not mentioned in his job description and thus there would be no issue of overtime claim."*

29. The Magistrate was also satisfied *"the manner in which AVL took to disregard Mr Berangben's concerns by blanket covering it by an action of transfer was not only in itself an act of ill-treatment but also an illegal action contrary to the principle of nature justice. When he was trying to raise his concern; he was shunned by a rather powerful gesture to shut up and just move to another position within two days. This court considers this as a gross misconduct."*

30. The Magistrate also accepted the evidence that he was sworn at by the General Manager of the Appeal. The Magistrate was entitled to make the finding she made on the basis of the evidence she had before her. There is no evidence produced to the contrary. There is no evidence of any error demonstrated by the learned Magistrate in respect to Ground 2 (a).

31. The Respondent submitted that the Magistrate was correct in her judgment of 30 April 2012 when she found the Respondent did not attend to his work as he was expecting a response to his queries. The Respondent was apprehensive of the General Manager of the Appellant that he will react in a hard way in respect to him. That was why on 21 June 2010 which was also his day-off, he decided to send his letter enquiring about the clarifications of the terms and conditions of his employment (overtime and sequences).

32. He did attend the work place on the next date 22 June 2010. He was escorted out by the security officer. The Magistrate found that the Respondent did not dissert his work. He was not welcomed to his own work place.

33. The Respondent submitted as he was escorted out, he was not aware or made aware of the letter transferring him to another position until 29 June 2014 when he sent a letter to the General Manager of the Appellant asking for him to answer to the queries he raised first in his e-mail letter of 21 June 2014 and he was not going to his work until the Appellant respondent to his queries on the conditions of his employment.

34. The learned Magistrate appreciated the factual situations. She found on the evidence that the Respondent expected professional response instead of answering him the Appellant transferred him to a position without job descriptions.

35. That was the reason why he made the letter of 29 June 2014 stating he is not taking the new position until the General Manager of the Appellant responded to his queries of 21 June 2010 and provided him with his job descriptions and level of salaries.

36. The Magistrate found that the Respondent was not disserting his work. He was not refusing to return to work as he needs the help and assistance of the Appellant to clarify the terms and conditions of his employment.

37. On the evidence before the Magistrate, there was no answer given to the Respondent's queries in respect to the terms and conditions of his employment. The learned Magistrate was entitled to make the findings she made on the evidence she had before her. There was no factual reason to find otherwise. Ground 2 (a) (b) and (c) of the appeal are dismissed.

Ground 3 is now considered

38. The Magistrate erred in fact and in law to find that it was lawful for the Appellant to terminate the Respondent's employment on the basis of refusal and neglect to come to work; it was in accord with the Appellant's staff manual as per its clause 2.3 and 6.2.

39. The critical finding was that the Respondent was appointed permanently in the administration office of the Appellant. He was responsible for the identification card of the Appellant and issued electronically identification cards for those who were directly or indirectly in relations with the Appellant. He sought clarifications and guidelines in terms of job descriptions in respect to his employment.

40. The Magistrate found that instead of replying professionally to the Respondent's concerns in his work, the Respondent was *"shunned by a rather powerful gesture to shut up and just move to another position within two days. This court considers this as gross injustice."*

41. The Appellant has the power and the right to terminate the Respondent's employment. However, the Respondent as a permanent employee is entitled to a lawful dismissal. The Magistrate was right to find the termination of the Respondent's contract was unlawful. The conduct of the Appellant, in the present case, precluded the Appellant to have recourse to Clause 6.2 of the Contractual Agreement between the Appellant and the Respondent. The Magistrate found it was not the case in the present case. The Learned Magistrate was entitled to make the findings she made on the basis of the evidence before her. There was no error demonstrated on the facts before her.

Ground 3 of the Appeal is dismissed.

Ground 4 is the last ground to be considered

42. The Magistrate erred in fact and law in awarding amounts (pp 8 and 9 of Judgment) which are excessive and contrary to the provisions of the Employment Act.

43. Save the interests base, the Appellant does not demonstrate any calculation error to show the amounts awarded were excessive. There is no evidence to the contrary.

44. I take it that the interests of 5% were intended to be calculated *"on judgment amount from the date of entitlement being the date of the claim i.e. 5 May 2011"* but not *"per month"* as appeared on the claim and the judgment of 30 April 2010. If there was a mistake, I now correct it.

45. Ground 4 is partly allowed only in relation to interest base.

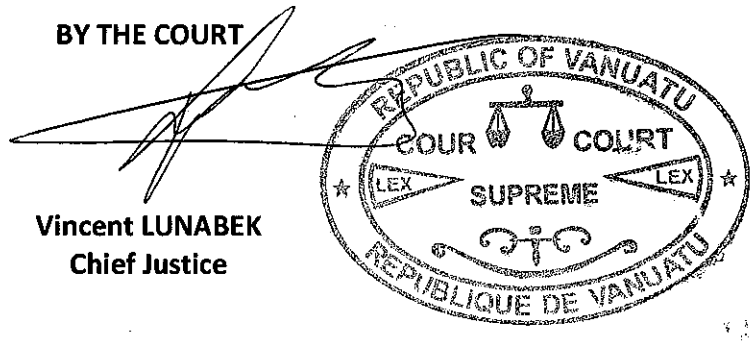
Conclusion

46. On the basis of the above considerations, I now dismiss the appeal, save interest base on this minor aspect.

47. The Respondent is entitled to the judgment amount and interests at 5% on judgment amount from the date of claim and he is entitled to costs in the Magistrate's Court and costs incurred on this appeal.

Dated at Port-Vila, this 23rd day of September 2016

BY THE COURT



Vincent LUNABEK
Chief Justice